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Supreme Court of the United States

October Term, 1976

UNITED AIR LINES, INC.,

Petitioner,

vs

LIANE BUIX McDONALD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT LIANE BUIX McDONALD

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In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-545

UNITED AIR LINES, INC.,
Petitioner,

vs

LIANE BUIX McDONALD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT LIANE BUIX McDONALD

QUESTION PRESENTED

In this case, an employer engaged in unlawful employment discrimination against a numerous class of persons. A class action, meeting the timeliness requirements of Title VII and the prerequisites for a class action under Federal Rule of Civil Procedure 23, was commenced by one of the aggrieved employees. The district judge incorrectly refused to grant class treatment, and interlocutory review of the class action order was not permitted. Within thirty days of entry of final decision, an excluded class member was informed that the named plaintiff had decided not to appeal the now final class ruling. On the day she learned

of this decision, she petitioned to intervene to prosecute the appeal. On this appeal, her intervention was found timely and the adverse class ruling was reversed.

The question presented is whether respondent and others similarly situated are barred from the relief required by Title VII because the appeal to correct the adverse class determination was prosecuted by an excluded class member, rather than by one of the named plaintiffs, where the excluded class member had timely intervened after judgment to take the appeal.

STATEMENT OF THE CASE

This case should mark the end of United Air Lines' herculean efforts to escape its obligations to respondent McDonald and others similarly situated.[1] The liability

[1] In contrast to the ordinary practice of a defendant faced by similar claims from members of a numerous class, United—rather than transfer and consolidate all similar cases, *cf.* 28 U.S.C. § 1407—has managed to keep this litigation scattered in a number of forums. This has allowed it (1) to defend its "no-marriage" rule on the merits in cases in the Northern District of Illinois, *Sprogis* v. *United Air Lines,* 308 F.Supp. 959 (N.D. Ill. 1970), aff'd, 444 F.2d 1194 (7th Cir. 1971), *cert. denied,* 404 U.S. 991 (1971), and in the Northern District of California, *Inda* v. *United Air Lines,* 405 F. Supp. 426 (N.D. Cal. 1975), *cross appeals docketed,* No. 75-1527 (March 6, 1975) and No. 75-2174 (May 29, 1975) (9th Cir.), (2) to escape until the Seventh Circuit's decision in this case a class-wide remedy, (3) to sever married stewardess claims from trial in a comprehensive attack on its discriminatory practices mounted by the EEOC in *EEOC* v. *United Air Lines,* No. 73 C 962 (N.D. Ill.), a trial which led to a broad consent decree including monetary redress and (4) to rely on procedural victories to escape liability in a number of individual actions. *E.g., Collins* v. *United Air Lines,* 514 F.2d 594 (9th Cir. 1975); *Buckingham* v. *United Air Lines,* 11 FEP Cases 344 (C.D. Cal. 1975). *Cf. Lansdale* v. *United Air Lines,* 437 F.2d 454 (5th Cir. 1971).

(footnote continued)

arises from United's discriminatory "no-marriage" rule,[2] the illegality of which was conclusively determined in *Sprogis* v. *United Air Lines,* 308 F.Supp. 959 (N.D. Ill. 1970), *aff'd,* 444 F.2d 1194 (7th Cir. 1971), *cert. denied,* 404 U.S. 991 (1971), and is no longer at issue. Although seven years have elapsed since the district court declared the illegality of the "no-marriage" rule, a remedy has yet to be provided to respondent and others similarly situated. In the decision now before this Court for review, the Seventh Circuit declared that class-wide relief should be furnished, but United as it has done in forum after forum in these cases urges this Court to find relief unavailable because of technical defenses.

1. Background: Sprogis v. United Air Lines

Prior to November 1968, United forbade its female but not its male flight attendants to marry, and any stewardess

(footnote continued)

Another casualty of United's unlawful "no marriage" rule is befor the Court in *United Air Lines* v. *Evans,* No. 76-333, *cert. granted,* 45 U.S.L.W. 3329 (Nov. 2, 1976). Evans had "involuntarily resigned" as a United Air Lines stewardess in 1969 because of the "no marriage" rule. *Evans,* Pet. Br. 4 . In 1972 she was hired by United "as a new stewardess" (*id.*) and subsequently filed an EEOC charge complaining of a continuing violation arising from United's failure to have afforded her retroactive seniority. (*Id.* at 5.) Evans is a member of the class in the instant case, and if the decision of the court of appeals here is affirmed she would be entitled in this case to the relief she seeks, irrespective of the validity of her theory of a continuing violation under Title VII.

[2] The no-marriage rule required that female flight cabin attendants be single when first employed and remain unmarried under penalty of discharge. There were no comparable restrictions on male cabin attendants. *Sprogis* v. *United Air Lines,* 444 F.2d at 1196 n.2.

(but not steward) who married was terminated. Although this discriminatory "no-marriage" policy became unlawful in 1965 on the effective date of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq, United retained the rule until November, 1968. It is estimated that more than 160 women were terminated under the rule during this period. (A. 57, 105.)

A number of the victims of this unlawful discrimination challenged United's "no-marriage" rule by filing charges with the Equal Employment Opportunity Commission. The first charge was filed in August, 1966 by one Mary Sprogis, who had been terminated by United on June 19, 1966. *Sprogis* v. *United Air Lines,* 444 F.2d at 1196. In 1968 the EEOC found reasonable cause to believe that United's policy constituted illegal sex discrimination, and on October 31, 1968 it issued Sprogis a right to sue letter. *Id.* She thereafter filed a timely, albeit individual action against United in the Northern District of Illinois.

On cross motions for summary judgment, the district court found that United's "no-marriage" rule was unlawful sex discrimination, contrary to Title VII. *Sprogis* v. *United Air Lines,* 308 F. Supp. 959 (N.D. Ill. 1970). The district court held that Ms. Sprogis was entitled to reinstatement as a stewardess and to compensation for her lost earnings, in an amount to be subsequently determined. Mindful of the purpose of Title VII to provide class-wide relief for class-wide discrimination, the district court requested memoranda on whether relief "should be made applicable to other Stewardesses discharged by Defendant." 308 F. Supp. at 961. United was permitted an interlocutory appeal on the issue of liability by the Seventh Circuit under 28 U.S.C. §1292(b), and the district court stayed

computation of the amount of back pay and resolution of the question of class-wide relief pending final adjudication of the question of liability. 444 F.2d at 1197. The Seventh Circuit affirmed United's liability, and this Court denied review. *Sprogis* v. *United Air Lines,* 444 F.2d 1194 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971).

2. Attempts To Obtain Class-Wide Relief

The present case was commenced during the pendency of United's interlocutory appeal in *Sprogis.* The original named plaintiff[3] had also exhausted the EEOC procedures and had timely brought suit on behalf of herself and all other similarly terminated United Air Lines stewardesses. (A. 11). In its answers to the complaint and amended complaint United denied that its no-marriage policy violated Title VII. (A. 17-18.) It also claimed that even if its policy requiring termination of stewardesses upon marriage was discriminatory in light of its policy towards male stewards, the policy had been adopted in reliance on an EEOC opinion. (*Id.*) Alternatively it claimed that an unmarried status was a bona fide occupational qualification for

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[3] Carole Leigh Romasanta, the original named plaintiff in this action, had been discharged by United on May 9, 1967. In response to a timely filed charge of sex discrimination, the EEOC on January 19, 1970 found that United in discharging her under its policy of terminating female flight attendants on marriage had "committed unlawful employment practices." (A. 13.) On April 17, 1970, the EEOC issued Ms. Romasanta a right to sue letter, and 28 days later, on May 15, 1970, she timely filed this class action on behalf of herself and all similarly terminated United stewardesses. (A. 13, 1, 11.) At that time the original *Sprogis* decision was on appeal to the Seventh Circuit. Shortly after Romasanta commenced this case, Brenda Bailes Altman was added as a named plaintiff by amendment to the complaint. (A. 1.)

woman flight attendants "necessary to the normal operation of the position of a stewardess." (A. 18.) United also raised specific defenses against Romasanta and Altman. (A. 19, R. 20.)

Following final adjudication of the liability question in *Sprogis* (I), plaintiffs in this case sought to consolidate their suit with *Sprogis,* then pending before the same judge. (A. 23). Contemporaneously with this motion to consolidate, Ms. Sprogis moved to enlarge her case into a class action.[4] Both motions were denied, without prejudice to consideration of class treatment in this case. 56 F.R.D. 420, 423 (N.D. Ill. 1972) (A. 25, 29).[5] However, six months later, on December 6, 1972 the district court refused to allow this case to proceed as a class.[6] The court announced that it would permit intervention by those stewardesses who had personally "protested" their discharge and whose names and addresses were known to counsel.[7] The effect of these orders was to deny a remedy to respondent McDonald and others similarly situated who had not individually "protested" United's unlawful employment practices.

[4] The Seventh Circuit had held that an extension of relief to those similarly situated as contemplated by the trial court was not inconsistent with Rule 23 and was within the plenary powers granted trial courts by section 706(g) of Title VII, 42 U.S.C. §2000e-5(g). 444 F.2d at 1201-02. The Seventh Circuit also noted, 444 F.2d at 1201, that "[a]t stake . . . are the interests of the other members of that class and the court has a special responsibility in the public interest to devise remedies which effectuate the policies of the Act as well as afford private relief to the individual employee instituting the complaint." Despite this, the district court on remand declined to expand *Sprogis* into a class action. Six months later, it denied class treatment in this case.

[5] The district court later explained its refusal to convert *Sprogis* into a class action: "I don't contend that a class action couldn't be maintained by other persons. It is my theory that if it is going to be a class action, let there be a class action in the beginning, so that the Court can have the full advice of all counsel and full defense. Certainly a defendant might make one defense and spend X dollars in defending an individual action; whereas if it were made a class action, they might spend a great deal more time of investigation and legal talent and what not if it is a class action." Hearing of July 28, 1972. (A. 34.)

[6] The district court articulated two reasons for refusing to allow the case to proceed as a class action. It doubted the effectiveness of the class mechanism. (A. 61.) Also it felt that "it is reasonable for the union and defendant United to assume that since they did not protest they had no further interest in further employment." (A. 57.) The court therefore held that a class could consist only of those women who had personally filed a charge with a federal or state agency or a collective bargaining grievance. No more than thirty women within this limitation could be identified, an insufficient number in the district court's view to satisfy the numerosity requirement of Federal Rule of Civil Procedure 23(a). (A. 60.)

[7] However, of the twenty-four "protesting" stewardesses who petitioned to intervene, twelve were not allowed to join in the case. Eight women, who had accepted reinstatement under an agreement between United and the Air Line Pilots Association, were denied intervention on an election of remedies theory. (A. 58.) Three women were excluded because their claims were pending before state agencies. (A. 58-59.) Also denied intervention was Doris Rivas Collins. She had personally filed an EEOC charge and commenced a Title VII action in the Western District of Washington. *Id.* (Collins' EEOC charge was later held untimely, her suit was dismissed and she was denied any relief. See *Collins* v. *United Air Lines,* 514 F.2d 594 (9th Cir. 1975).) Also excluded were women who plaintiffs believed to exist but were unable to locate. One such person was later located in April 1973, and she was permitted to intervene. (A. 4-5, R. 56.)

The district court recognized that interlocutory review of its class order would "materially advance the ultimate termination of the litigation" (A. 61) and certified the order for an interlocutory appeal under 28 U.S.C. §1292(b), as had occurred on the issue of liability in *Sprogis*. The named plaintiffs timely sought permission to appeal. They explained why interlocutory review of the class action order would "materially advance the termination of the litigation" as follows:

> The District Court's Order and Memorandum substantially alters the nature of this suit. Instead of a class action composed of possibly well over one hundred members, the District Court's Order converts the suit to an individual action on behalf of fourteen individuals. The District Court's order precludes the bulk of Stewardesses discharged by reason of their marriage from seeking reinstatement and back pay. If this appeal is accepted and if the District Court's Order is reversed, the final stage of this lawsuit, the determination of the damages owing to Stewardesses now deemed to be ineligible to recover, would be materially advanced. The alternative, if this appeal is not permitted until the final judgment in the District Court, would not only delay the final termination of the case but also would result in the duplication of damage award proceedings, since the damages owing to the fourteen persons now joined in the suit would then have been determined. Moreover, delay imposes an unnecessary burden on Stewardesses—all of whom were discharged due to marriage prior to November 1968; the longer the delay, the less likely that an individual will be in a position to disrupt her established way of living in order to accept reinstatement as a Stewardess. For these reasons, an immediate appeal of the issues decided in the District Court's Order and Memorandum may materially advance the termination of the litigation. (A. 71-72.)

The Seventh Circuit, however, denied plaintiffs permission to appeal (A. 82), and the result, as the named plaintiffs had foretold in their petition for permission to appeal (A. 72), was that review of the class action was not permitted until the final judgment in the District Court, in October 1975.

3. Adjudication of Individual Claims

Following the refusal of the court of appeals to grant interlocutory review of the class action orders, the parties then began litigation of the individual claims. After defendant had deposed eight of the plaintiffs, those who had not as yet obtained reinstatement moved for partial summary judgment on liability and for an order granting reinstatement. (A. 83.) A number of these motions were opposed by defendant. (R. 61.) The plaintiffs who had obtained reinstatement moved for summary judgment on the issue of liability and entitlement to compensation for lost earnings. (A. 86-87.) On July 2, 1974, the district court granted the motions for summary judgment of the reinstated plaintiffs, holding as it had in *Sprogis* that the terminations "pursuant to a policy requiring that all Stewardesses be unmarried when hired and remain unmarried while so employed constitute unlawful sex discrimination . . . in violation of Title VII of the Civil Rights Act of 1964 . . . ." (A. 88.) As it had done in *Sprogis*, the district court decreed that plaintiffs were entitled to compensation for their loss of earnings resulting from defendant's wrongful conduct. *Id.* And again, following the procedure in *Sprogis* (308 F. Supp. at 961-962), the district court observing that the record did not disclose the amount of compensation lost by plaintiffs appointed a special master to make recommendations as to the amount of back pay due to each plaintiff. (A. 88.)

The special master appointed in this case had also been appointed in *Sprogis*. His recommendation of monetary compensation for Sprogis had been approved by the district court on July 3, 1974 and affirmed on appeal, *Sprogis* v. *United Air Lines*, 517 F.2d 387 (7th Cir. 1975) (*Sprogis II*). The special master and the parties applied the guidelines developed in *Sprogis* (*II*) to the claims of the individual plaintiffs in this case (A. 91), and United paid the amounts so determined. In a final decision entered on October 3, 1975, after all moneys due as compensation for lost wages had been paid over by United to plaintiffs, the court denied one contested claim, resolved a dispute as to seniority and entitlement of compensation of another plaintiff and dismissed with prejudice the claims of plaintiffs who had prevailed. (A. 91-92.)

4. Intervention After Judgment To Appeal The Adverse Class Determination

Respondent Liane Biux McDonald is a former United stewardess who was excluded from participation in the case by the adverse class determination. McDonald was discharged by United under its no-marriage policy in September, 1968 after serving as a United stewardess continuously since 1965. (A. 95.) She knew that other terminated United stewardesses were prosecuting EEOC charges and union grievances, and she did not file another charge of grievance since she believed these would govern her situation.[8] *Id.* This meant, however, that she found herself

[8] Without any support in the record, petitioner asserts (Pet. Br. 6-7) that respondent had failed to make her claim known to United. This is not the case. Respondent McDonald was listed in a computer print-out in United's own records by name, social security number, senority date, monthly salary and date of termination as a stewardess whom United had terminated under its no-marriage policy.

(footnote continued)

excluded by the adverse class determination and the trial court's ruling that only persons who had individually filed could recover against United in this action.

On October 8, 1975, McDonald was informed by plaintiffs' counsel that a final decision had been entered in the case on October 3, 1975. (A. 95.) Although she knew that plaintiffs had tried, albeit without success, to gain interlocutory review of the class ruling, on October 8th she was informed that it was unlikely that they would prosecute an appeal of this now final ruling. (A. 95.) McDonald sought and obtained counsel, and on October 17, 1975 was told that plaintiffs would definitely not appeal. On that day, she served a petition to intervene under Federal Rules of Civil Procedure 24(a) and 24(b) for the purpose of continuing the case through appeal of the adverse class determination. (A. 93, R. 95.)

The petition was argued four days later, October 21, 1975. Without the receipt of any evidence from United, the district court that day at the conclusion of oral argument

(footnote continued)

(United turned this list over to plaintiffs in the summer of 1972 in response to discovery requests in preparation for briefing the issue of the numerousity of the plaintiff class.) See United's *Out Of Service Listing, 1966-71* at 155, appended to Plaintiffs' Status Report of September 11, 1972. (R. 38.) Also, after the United ALPA agreement of November, 1968 (A. 20-21) which appeared to offer some possibility of reinstatement was announced, McDonald twice contacted United to attempt to regain her position. She was told on both occasions that reinstatement was available only to those stewardesses who had on or before the effective date of the agreement personally filed a charge or a grievance and that there was nothing she could do. This limiting interpretation of the agreement is consistent with its express terms (A. 20) and appears to have been a consistent policy of United. See *Inda* v. *United Air Lines*, 405 F. Supp. 425, 429 (N.D.Cal. 1975).

denied intervention as untimely. (A. 101-02.) Two days later on October 23, 1975, within 30 days of the entry of the final decision of October 3, 1975, McDonald filed two notices of appeal, the first from the denial of intervention and the second from the order denying class status. (A. 103.)

The court of appeals reversed. It first found that the petition to intervene was timely under Rule 24 because of the lack of prejudice to United, the interest of McDonald in participation in the action through class treatment, the purposes of Title VII and McDonald's diligence in seeking to intervene as soon as she learned that the named plaintiffs decided not to appeal. (A. 106-09.) On the merits of the class determination, the Seventh Circuit held that the trial court had plainly erred in holding that the filing of a charge with a state or federal agency or the exhaustion of the collective bargaining remedy was a prerequisite to recovery. (A. 109-10.) The case was remanded with instructions that the matter proceed on a class basis and that the district court fashion relief for the class consisting of all similarly situated former United stewardesses. (A. 110.)

SUMMARY OF ARGUMENT

United no longer contends that being unmarried is "reasonably necessary to the normal operation of the position of stewardess" (third affirmative defense, A. 18), and does not dispute that the district court erred in refusing to fashion class relief for respondent and others similarly situated. The issues presented in this case arise from the fact that the reversal of the adverse class determination was obtained through an appeal prosecuted by respondent—an excluded class member who had timely intervened after judgment—rather than by one of the named plaintiffs.

Respondent McDonald filed her petition to intervene for the purpose of taking an appeal within 18 days of final judgment in the district court. As the court of appeals correctly held, after considering the purpose of the intervention, the inadequacy of representation, the lack of prejudice to defendant and the policies of Title VII, intervention was timely.

The timely filing of an EEOC charge and the subsequent filing of this class action satisfied the limitations period of Title VII for all members of the class as it was subsequently determined by the court of appeals. Nothing in *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974), requires a different result. The novel tolling principle urged by petitioner is contrary to the broad class relief required by Title VII, and seeks to resuscitate the arguments rejected by Congress when it refused to limit class actions in Title VII cases. The only claimed benefit from petitioner's novel tolling principle is that it would facilitate settlements, but the only settlements encouraged by petitioner's rule would be "sell-outs" contrary to the policies of Title VII.

Respondent's petition to intervene after judgment was timely, and her remedy under Title VII is not barred by any statute of limitations. The novel tolling theory urged by petitioner must be rejected, and the judgment of the court of appeals affirmed.

I.

McDONALD'S INTERVENTION AFTER JUDGMENT TO OBTAIN REVIEW OF THE CLASS RULING WAS UNDER ALL THE CIRCUMSTANCES TIMELY.

This action was commenced to obtain a remedy under Title VII for the over one hundred and sixty women who were the victims of United Air Lines' "no marriage" policy. In the course of the litigation, the district court erroneously refused to provide class relief, holding that a remedy would only be available for those—unlike respondent and perhaps 140 others—who had personally filed their own charges against the "no marriage" rule.[9] An appeal could not be taken from the adverse class determination as a matter of right,[10] and the court of appeals refused the named plaintiffs permission to appeal pursuant to 28 U.S.C. §1292(b). (A. 82.) Appellate correction of the class action order was therefore postponed until an appeal could be perfected from the final decision.

There is no real question that the named plaintiffs could have appealed from the final decision and obtained review of the adverse class determination. See *Senter* v. *General Motors Corp.*, 532 F.2d 511, 519-20 (6th Cir. 1976) (cases collected); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 751 n.7 (1976). But, as their attorney explained in the district court (A. 100), "[O]ur plaintiffs have chosen not to do so." Immediately after learning of this decision and within the 30-day period for perfecting an appeal, respon-

[9] Requiring that a victim of unlawful employment discrimination individually protest the employment practice is plainly wrong. *Bowie* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 411 n.8 (1975).

[10] *King* v. *Kansas City Southern Industries, Inc.*, 479 F.2d 1259 (7th Cir. 1973); *Anschul* v. *Sitmar Cruises, Inc.*, 544 F.2d 1364 (7th Cir.), *cert. denied*, 97 S.Ct. 272 (1976). *Cf. Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976).

dent Liane Buix McDonald filed her petition to intervene "for purposes of taking an appeal." (A. 93-95.)

Intervention after judgment for the purpose of taking an appeal is an old and well-established procedural device,[11] appropriate when as here an erroneous ruling of a trial court, if not corrected through appellate review, will have a direct, adverse effect on a person not a named party. The function of intervention after judgment was disregarded by the district judge, who denied intervention on the grounds that allowing intervention after judgment would prevent the litigation from coming to an end. (A. 101.)

It was precisely to stop the litigation from coming to an end without appellate correction of the erroneous class action order that McDonald petitioned to intervene.[12] This

[11] See, e.g., *Smuck* v. *Hobson*, 408 F.2d 175, 181-82 (D.C. Cir. 1969); *Arizona* v. *Hunt*, 408 F.2d 1086, 1092 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969); *Pellegrino* v. *Nesbit*, 203 F.2d 463 (9th Cir. 1953); *Wolpe* v. *Poretsky*, 144 F.2d 505, 508 (D.C. Cir. 1944); *United States Casualty Co.* v. *Taylor*, 64 F.2d 521, 526-27 (4th Cir. 1933); *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 3 F.R.D. 162 (S.D.N.Y. 1942). See generally 3B *Moore's Federal Practice* ¶24.13, at 527-28 & nn. 15, 16 (1976); Wright & Miller, *Federal Practice and Precdure* §1916, at 583-83 & n. 14 (1972).

[12] McDonald petitioned to intervene both as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure and permissively under Rule 24(b)(2). (A. 93.) The court of appeals, after finding the petition timely, held that the intervention should have been allowed under Rule 24(b)(2) and therefore did not reach the question of whether petitioner was entitled to intervene as of right. (A. 108-09.) United does not contest this ruling, and there would appear no reason to consider intervention under Rule 24(a)(2) unless the Court finds that the determination of timeliness or resolution of United's limitations argument would be different. McDonald also argued below that she had standing to appeal directly from the final judgment in the district court as a person denied any remedy under Title VII by the class order. The Seventh Circuit also did not reach this contention.

was recognized by the court of appeals, which, after examining all of the circumstances in accordance with the standards of *NAACP* v. *New York,* 413 U.S. 345 (1973), held that intervention was timely. The petition to intervene came after entry of the final decision in the district court, and within the time the named plaintiffs could, had they so chosen, have perfected an appeal. Intervention could not, therefore, have delayed proceedings in the district court. Nor would United be prejudiced by intervention after judgment to appeal, because it "knew of the potential liability to this class since the commencement of the class action, and until October 17th, defendant could reasonably expect its liability to be enforced through an appeal of the adverse class ruling." (A. 108.) No delay can be ascribed to respondent. McDonald served the petition on the very day that she learned that the named plaintiffs had decided not to appeal and her existing representation had become inadequate. (A. 107.) Finally, intervention after judgment to appeal the adverse class determination would further the policies of Title VII to provide class-wide relief for class-wide discrimination. (A. 107-108.)[13]

[13] Although her reliance on her former fellow employees has been approved by Congress, below at 30, and by this Court, *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 411 n.8 (1975), United claims that respondent is to be faulted because she did not do more. But as McDonald makes clear in the affidavit she filed with her petition to intervene, she was aware that her former colleagues were vigorously prosecuting EEOC complaints and union grievances in September, 1968 when she was discharged, that she believed (correctly, as the law developed) that her situation would be governed by theirs and that nothing would be gained if she were to herself file repetitive charges or grievances. (A. 95.) United of course had actual knowledge of its potential exposure from these pending charges. It also had actual knowledge of respondent. It maintained in its records McDonald's name as a stewardess whom it had discharged under its no-marriage rule and to whom it was potentially liable. See United's computer printout at 155, appended to Plaintiff's Status Report of September 11, 1972, in which she is listed. (R. 38.)

United did not seek review of this finding of timeliness in its petition for writ of certiorari.[14] In its brief on the merits, however, United contends that intervention was untimely. (Pet. Br. 19-25.) "Timeliness" in United's view is to be measured solely by the passage of time from issuance of the interlocutory class action order. It argues that the petition would be timely only if made immediately after class certification was denied. The court of appeals properly rejected this argument. As this Court held in *NAACP* v. *New York,* supra, the point to which the suit has progressed is not solely dispositive, 413 U.S. at 365; otherwise, intervention after judgment would be virtually impossible. Instead, timeliness is to be determined from all of the circumstances. 414 U.S. at 366. The informed exercise of discretion, as the Seventh Circuit recognized, requires no less. (A. 106.) In this case, the status of the litigation, the purpose of intervention, the inadequacy of representation by the named plaintiffs, the lack of prejudice to defendant and the policies of Title VII made intervention—18 days after entry of the final decision—

[14] United presented only a single question in its petition for certiorari:

> Does the principle established by *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974) that the applicable statute of limitations is suspended for putative class members only until class action status is denied apply to all class actions, including those brought under Title VII of the Civil Rights Act of 1964? Pet. for Cert. 2.

This question is therefore not properly before the Court. Supreme Court Rule 40(1)(d)(2); *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 428-49 (1964); *Neely* v. *Martin K. Eby Construction Co.,* 386 U.S. 317, 321 n.3 (1967).

timely. Intervention prior to entry of the final decision would have been premature, first because it would not have occasioned appellate review of the adverse class determination, and second because there was no reason to believe that the named plaintiffs had retreated from their stated indication (A. 71-72) to seek review of the adverse class determination on an appeal from the final decision.[15]

Under all of the circumstances intervention in this case was timely, and respondent was properly before the court of appeals to obtain reversal of the class determination.

II.

ROMASANTA'S TIMELY FILING OF THIS CLASS SUIT COMMENCED THE ACTION FOR ALL MEMBERS OF THE CLASS AS SUBSEQUENTLY DETERMINED BY THE SEVENTH CIRCUIT, INCLUDING RESPONDENT McDONALD.

It is settled that the limitations periods of Title VII are satisfied for all victims of class-wide employment discrimination when one aggrieved employee files a timely EEOC charge and then commences a class action within the time limits of Sections 706(e) and 706(f)(1), 42 U.S.C. §§2000e-5(e), 5(f)(1). *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 411 n.8 (1975). As petitioner concedes (Pet. Br. 12), the limitations periods of Title VII were satisfied for respondent and others similarly situated when Carole

[15] Also, a petition to intervene at an earlier point would have been futile, since the district court had ruled that only persons who had filed individual charges or grievances could intervene. (A. 56-57.)

Anderson Romasanta filed her EEOC charge and then commenced this class action twenty-eight days after issuance of a right to sue letter.[16]

That a statute of limitations is tolled for all members of a class by the timely commencement of a class action is apparent from *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974). When, as here, an adverse class determination is reversed on appeal, the rights of formerly excluded class members "are to be determined as if the class action had been allowed instead of being incorrectly determined below." *Esplin* v. *Hirschi*, 402 F. 2d 94, 101 n.14 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).[17]

United agrees that the statute of limitations would have remained tolled had the named plaintiffs prosecuted the appeal from the final decision to obtain reversal of the adverse class determination. (Pet. Br. 15.) But because the appeal was prosecuted by an excluded class member who timely intervened after judgment (see above at 14-18), United argues that a statute of limitations has run to bar relief for respondent and other excluded class members. (Pet. Br. 18.)

[16] In 1970 a Title VII charge had to be filed within 180 days of the alleged unlawful employment practice, 42 U.S.C. §2000e-5(d) (redesignated in 1972 as §2000e-5(e)), and suit filed within 30 days of issuance of the right to sue letter, 42 U.S.C. §2000e-5(e) (amended 1972). These time periods were satisfied here. Romasanta was discharged on May 9, 1967 and filed her charge with the EEOC on July 25, 1967. (A. 13.) She filed this class action on May 15, 1970, 28 days after she had been issued a right to sue letter. (A. 13, 1.)

[17] United did not seek review of the decision by the court of appeals that this case should have been allowed to proceed as a class action. This ruling is therefore not before the Court. *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 121 n.6 (1974); *Nemet* v. *United States*, 373 U.S. 179, 190 (1963).

United does not attempt to reconcile its statute of limitations theory with either the language or the legislative history of Title VII or the policies underlying Rules 23 and 24. Instead, United relies on a skewed reading of *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974). We disagree. In our view, under familiar principles which have been applied to statutes of limitations, *Burnett* v. *New York C. R. R.,* 380 U.S. 424, 435 (1965), the correct rule after *American Pipe* is that when, as here, an appeal from the final decision results in reversal of the unfavorable class ruling, the statute of limitations remains satisfied for the class by the timely commencement of the class action as though the class had been correctly permitted by the District Court.

A. United's Rule Is Inconsistent With Familiar Suspension Principles And Would Waste The Resources Of Courts And Litigants.

The novel tolling rule urged by United would renew the running of the limitations period between the time of an adverse class determination in the trial court and its reversal on appeal (or even on reconsideration in the trial court), no matter how erroneous the ruling and no matter how exhaustive had been the efforts of the named plaintiffs to obtain interlocutory review.[18] This "untolling" of the limitations period would not take place immediately, but would depend upon whether

[18] The class ruling here, which held that only persons who had personally filed a charge were entitled to relief, was plainly wrong when issued. The *Seventh Circuit in Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969), had previously rejected that limitation on Title VII relief. The named plaintiffs vigorously sought immediate, interlocutory review, to no avail. (A. 62-72, 83.)

the named plaintiffs later decide to appeal from the final decision. Only if the plaintiffs elected not to appeal would United argue that the statute had run. United concedes (Pet. Br. 15) that there would be no statute of limitations defense if the named plaintiffs had appealed from the final decision, a concession necessary if an erroneous class ruling is not to be completely immunized from review.

The question of whether a statute of limitations started to run in 1972—for 90 or 180 days[19]—would therefore be determined by events which take place, as here, some three years later when following entry of the final decision, the named plaintiffs elected not to appeal. United claims (Pet. Br. 14) that its tolling principle is the corollary requirement of *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974). We disagree with this reading of *American Pipe.* In our view, a determination that a case shall be maintained on a class basis gives all class members the benefit of the suit's timely commencement.

In *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974), the parties excluded from participation in a case by an adverse class determination sought to intervene in the trial court proceedings. 414 U.S. at 543-44. The issue was whether these intervenors could benefit from any tolling of a statute of limitations brought about by commencement of the class suit. The Court answered this narrow question in the affirmative. But unlike this case, plaintiffs and intervenors had acquiesced in the adverse class determination, 414 U.S. at 552, and the Court had no need to determine whether a statute of limitations, tolled by the commencement of the original class suit, remains satisfied when, as here, the adverse class determination is reversed on appeal. The Court did, how-

[19] United is unable to specify which period it considers a limitation under Title VII. See Pet. Br. 18.

ever, state the general rule that "the filing of a timely class action complaint commences the action for all members of the class as subsequently determined," 414 U.S. at 550, and lower federal courts that have considered this question have reached this result.[20] Since respondent was a member of the class "as subsequently determined," any limitations period satisfied by Romasanta's timely commencement of the class action remained tolled for McDonald and other class participants in the case.

United's rule, in contrast, would give preclusive and final effect to what has been universally regarded as a

[20] In *Esplin* v. *Hirschi*, 402 F.2d 94, 101 n.14 (10th Cir. 1968), the Tenth Circuit after reversing an adverse class determination held that the rights of class members "are to be determined as if the class action had been allowed instead of being incorrectly terminated below." See also *Jimenez* v. *Weinberger*, 523 F.2d 689, 696 (7th Cir. 1975) (Stevens, J.) ("If that decision had expressly refused to certify the case as a class action, we think the tolling would have continued if the plaintiffs had appealed from such ruling . . . ."); *Philadelphia Elec. Co.* v. *Anaconda American Brass Co.*, 43 F.R.D. 452, 460 (E.D.Pa. 1968).

Pearson v. *Ecological Science Corp.*, 522 F.2d 171 (5th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976), relied on by United (Br. 13-16), apparently adopts the general rule. Unlike this case, the plaintiffs there had explicitly agreed in their settlement agreement not to pursue appellate review of an adverse class determination, and *Pearson* appears to indicate that the statute of limitations remained tolled up to the date of settlement agreement was approved. 522 F.2d at 178. *Monarch Asphalt Sales Co.* v. *Wilshire Oil Co.*, 511 F.2d 1073 (10th Cir. 1975), also cited by United (Br. 15), assumed the validity of the rule without discussion, since the court considered intervenors' class question appeal on the merits and only moved on to the question of whether their intervention was otherwise time-barred after affirming the adverse class determination.

conditional and interlocutory class order.[21] That a statute of limitations conventionally remains tolled until the order ending such suspension becomes final by the running of the time during which an appeal may be taken or the entry of final judgment on appeal is apparent from *Burnett* v. *New York C. R. R.*, 380 U.S. 424 (1965). There, an FELA action[22] had been timely brought in state court within the applicable three-year limitation period but was dismissed for imroper venue. 380 U.S. at 425. Within the time to appeal the order of the state trial court, but more than three years after the claim accrued, the employee commenced an identical action in federal court. Id. at 425. Applying "familiar principles which have been applied to statutes of limitations," 380 U.S. at 435,[23]

[21] With the limited exception of the "death knell" doctrine applied in one or two circuits, an adverse class ruling is interlocutory and cannot be reviewed until after final judgment. *Anschul* v. *Sitmar Cruises, Inc.*, 544 F.2d 1364, 1366 n.1 (7th Cir. 1976), *cert. denied*, 97 S.Ct. 272 (1976) (cases collected); *Shayne* v. *Madison Square Garden Corp.*, 491 F.2d 397 (2d Cir. 1974); *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3d Cir. 1972). As to the "death knell" exception, not applicable here, compare *Korn* v. *Franchard Corp.*, 443 F.2d 1301 (2nd Cir. 1971), with *Anschul*, 544 F.2d at 1367. The explicit terms of Rule 23(c)(1) themselves suggest the conditional nature of class rulings in the trial court. See generally *American Pipe*, 414 U.S. at 561-62 (Blackmun, J., concurring). Also inapplicable here is interlocutory review gained on an appeal of a denial of a preliminary injunction, as in *Jenkins* v. *Blue Cross Mutual Hospital Ins., Inc.*, 538 F.2d 164, 166 n.2 (7th Cir. 1976) (en banc).

[22] 42 U.S.C. §201 et seq.

[23] The "familiar principle" of *Burnett* is illustrated by cases such as *Russ Togs, Inc.* v. *Grinnell Corp.*, 426 F.2d 850, 857 (2nd Cir.), *cert. denied*, 400 U.S. 878 (1970); *Twentieth-Century Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F.2d 846, 857-58 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952).

this Court held that the limitations period, tolled by the filing of the state action, remained tolled "until the state court order dismissing the state action becomes final by the running of the time during which an appeal may be taken or by the entry of a final judgment on appeal." Id. Nothing in *American Pipe* even faintly suggests that an interlocutory class order, reversed on appeal, should be considered final when issued in the face of this familiar principle.

Any departure from this "familiar principle" is particularly inappropriate here where intervention is for purposes of appeal. When, as here, the intervenor seeks only to continue the original cause of action, it has until this case apparently been assumed without discussion that for limitations purpose the intervenor takes the original filing date.[24] This is consistent with the requirement noted in *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), that there be "complete identity of the causes of action." 421 U.S. at 467 n.14.

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[24] No cases have been found even questioning this rule, and in related situations it has been universally assumed that intervention asserting the same cause of action will relate back. See, e.g., *Silverman* v. *Re*, 194 F. Supp. 540, 542 (S.D.N.Y. 1961) (limitations for derivative defendant corporation realigned by intervention as plaintiff suspended by initial filing by derivative plaintiff); *Brauer* v. *Republic Steel Corp.*, 460 F.2d 801, 804 (10th Cir. 1972) (intervening lessee in property damage action relates back to filing date of injured property lessor); *Link Aviation, Inc.* v. *Downs*, 325 F.2d 613, 615 (D.C. Cir. 1963) (limitation tolled by subrogee's suit for subrogated insurance company intervenor); *Pentland* v. *Dravo Corp.*, 152 F.2d 851 (3rd Cir. 1945) (intervention by fellow employee dates back to time of commencement of FLSA suit). Cf. *Escott* v. *Barchris Const. Corp.*, 340 F.2d 731 (2d Cir. 1965) ("spurious" class actions under old Rule 23); *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961) (id.).

The waste of resources of both litigants and the courts in United's rule cannot be overestimated. Because the named plaintiffs have the incentive of gaining a group with which to share attorney's fees and expenses, they can be expected in most cases to appeal an adverse class determination, thereby rendering protective intervention a complete waste of money and effort. But under United's rule, persons excluded by an erroneous, adverse class determination may not rely on the likelihood that the named plaintiffs will seek review. Instead, they must look to intervene on the off-chance that years later the plaintiffs might abdicate. United's rule thus would require excluded class members to "opt-into" the case by protectively intervening before any limitations period could become "untolled" and run, precisely the duplication of effort and expense that representative actions under Rule 23 are designed to avoid.[25] *American Pipe*, 414 U.S. at 553. In addition, after an adverse class determination United's rule would leave helpless the great majority of absent class

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[25] Every step taken by named plaintiffs in this case indicated that they would in fact pursue the class question by appeal after final judgment. The named plaintiffs attempted to gain appellate review by petitioning the Seventh Circuit for permission to take an interlocutory appeal. (A. 62.) Although this was unsuccessful, they had indicated in their petition for permission to appeal that an appeal would be taken from the final decision. (A. 71-72.) During the following three years before entry of final judgment, the named plaintiffs vigorously advanced respondent's interest. They moved for and obtained summary judgment on the question of United's violation of Title VII of its no-marriage rule as well as a determination that they were entitled to reinstatement and compensation for loss of earnings. (A. 88.) Plaintiffs then vigorously prosecuted common questions involved in the computation of damages before a special master and obtained a complex determination on this issue including prejudgment interest and overtime. (A. 91.) Thus, al-

(footnote continued)

members who do not know that they must intervene protectively.[26]

Finally, the evils of stale claims—surprise and prejudice—are avoided without recourse to United's draconian rule. As noted in *American Pipe,* surprise and prejudice are avoided and essential fairness is assured in a class action when, as here, the representative plaintiff in commencing the suit has notified the defendant of the substantive claims being brought and the approximate number and generic identities of persons who may participate in the judgment. 414 U.S. at 553-55.

The only "surprise" to United here was that McDonald, not plaintiffs, prosecuted the class appeal. United is unable to even suggest any prejudice from these circumstances. United has had notice of its potential liability to the class of women who have lost their jobs since this action was commenced. As the court of appeals observed (A. 108), throughout the entire course of this case United had every reason to expect its liability to the class would be enforced through an appeal of the adverse class ruling after final decision. The plaintiffs retained standing to prosecute this appeal, and certainly could have appealed if

(footnote continued)

though the attempt to obtain interlocutory review of the adverse class determination was unsuccessful, there was nothing more conceivably that the named plaintiffs could have done to advance respondent's interests until October 17, 1975, two weeks after judgment, when they informed McDonald they would not appeal.

[26] United cites *Pearson* v. *Ecological Science Corp.*, 522 F.2d 171 (5th Cir. 1975), *cert. denied,* 425 U.S. 912 (1976), for the proposition that no notice need be given of an adverse class determination or of a decision not to appeal. But the lack of notice compels rejection of any rule that means people must intervene protectively within a relatively short time period (here 90 or 180 days) or be time-barred. *See Developments in the Law—Class Actions,* 89 Harv. L. Rev. 1318, 1540-46 (1976).

they had chosen.[27] It is fair to say, as in *Jimenez* v. *Weinberger,* 523 F.2d 689, 701 (7th Cir. 1975), that if the district court had not committed error when it addressed the class question, United years ago would have faced the judgment that it now asks the Court to reverse. With notice of the size of its potential liability and the substantive claims asserted, United cannot claim any prejudice from the delay in appellate correction of the erroneous class action order.

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[27] There is no merit to United's veiled claim that following entry of the final decision the named plaintiffs lacked standing to prosecute an appeal. (Pet. Br. 15). The law is settled that a named plaintiff in a Title VII case may appeal after final decision to obtain review of an adverse class determination even though the individual plaintiff has obtained full redress no further relief. See *Senter* v. *General Motors Corp.,* 532 F.2d 511, 519-20 (6th Cir. 1976) (cases collected); *Jenkins* v. *United Gas Corp.,* 400 F.2d 28, 30 (5th Cir. 1968); *Rosen* v. *Public Service Electric & Gas Co.,* 477 F.2d 90, 94 (3d Cir. 1973). See *Franks* v. *Bowman,* 424 U.S. 747, 751 n.7 (1976).

Nor can it be fairly contended here that plaintiffs "settled" or waived their right to appeal. As seen below (at 34), this was neither explicitly nor implicitly part of the resolution of this lawsuit. To the contrary, as plaintiffs' counsel stated in the district court after entry of the final decision:

> We could on behalf of the class action representatives at the present time, I believe, file a notice of appeal from that original ruling with respect to the class action allegations, but our plaintiffs have chosen not to do so. (A. 100-01.)

It is even incorrect to call the final decision a settlement, which United describes (Pet. Br. 16) as a situation "in which each side gives ground. . . ." There was little if any giving of ground in this case. United had been adjudged guilty of violating Title VII, and plaintiffs had obtained an affirmative order that they were entitled to reinstatement and compensation. While it may be true that defendant at some point began discussions on the actual amounts due, it is hardly accurate to describe this as a "settlement." See *Hiram Ricker & Sons* v. *Students Int'l Meditation Soc'y,* 501 F.2d 550, 553 (1st Cir. 1974).

In *American Pipe,* 414 U.S. at 550, this Court stated "that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." This rule is equally applicable to a determination made in the appellate court as one made in the trial court, and whether at the instance of a named plaintiff or an excluded class member who has otherwise timely intervened to prosecute the appeal. Since McDonald is concededly a member of the class "as subsequently determined," the filing of this timely class suit commenced the action as to her and all other class members. There was no time bar to her petition to intervene for purposes of obtaining appellate review of the class question, and the judgment below should be affirmed.

B. United's Rule Is Antithetical To Broad Class Relief Required By Title VII And Available Under Rule 23.

In construing the time periods of Title VII and mindful of what this Court later described as the central purpose of Act "to make persons whole for injuries suffered on account of unlawful employment discrimination,"[28] the lower federal courts uniformly have held that the time limits of the exhaustion requirement of section 706(e) would be satisfied for all victims of unlawful discrimination whenever a single employee filed a timely charge with the EEOC and then commenced a class action within the time limits of section 706(f)(1).[29] In approving these rulings in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), this

[28] *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418 (1975).

[29] E.g.,*Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d 711, 720 (7th Cir. 1969); *Macklin* v. *Spector Freight Systems, Inc.,* 478 F.2d 979, 989 (D.C. Cir., 1973); *United States* v. *Georgia Power Co.,* 474 F.2d 906, 925 (5th Cir. 1973).

Court noted that Congress had plainly ratified this construction of the limitations period of Title VII when it refused to limit class actions in the 1972 amendments to Title VII. 422 U.S. at 414 n.8.

In further recognition of the need for broad class relief in Title VII cases, the lower federal courts have agreed that a named plaintiff in a Title VII case may appeal from a final decision to obtain review of an adverse class determination, even though the individual plaintiff retains no personal claim or has received full satisfaction.[30] This Court has recently noted its approval of these decisions. *Sosna* v. *Iowa,* 419 U.S. 393, 401 n.10 (1975); *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 751 n.7 (1976).

It is against this background that petitioner asks this Court to limit class relief in Title VII cases and thereby hold United harmless for its liability to respondent and others similarly situated who have yet to receive a remedy for the injuries they have suffered from United's unlawful employment discrimination.

Under the novel tolling theory urged by United, whenever a district court refuses to allow a Title VII case to proceed as a class action, persons excluded from participation by the adverse class ruling must immediately seek to intervene lest the defendant "buy off" the named plaintiffs[31] and extinguish the possibility of review of the ad-

[30] *E.g., Senter* v. *General Motors Corp.,* 532 F.2d 511, 519-20 (6th Cir. 1976); *Brown* v. *Gaston County Dyeing Machine Co.,* 457 F.2d 1377 (4th Cir. 1972); *Thurston* v. *Dekle,* 531 F.2d 1264 (5th Cir. 1976); *Roberts* v. *Union Company,* 487 F.2d 387 (6th Cir. 1973); *Parham* v. *Southwestern Bell Telephone Co.,* 433 F.2d 421 (8th Cir. 1970); *Moss* v. *Lane Co.,* 471 F.2d 853 (4th Cir. 1973).

[31] The plaintiffs in this case were not "bought off," and could, had they so chosen, have appealed from the final decision and obtained reversal of the adverse class determination. See note 27 above.

verse class ruling on appeal from the final decision. The inevitable consequence of this tolling principle would be to narrow the scope of relief available under Title VII whenever a district court incorrectly refuses to allow class relief, unless all members of the aggrieved class individually participate in the district court proceedings.

United's result, although through a different path, was proposed in the "Erlenborn substitute"[32] and rejected by Congress in the 1972 amendments to Title VII. As does United here, Representative Erlenborn would have required all victims of unlawful employment discrimination to participate in district court proceedings in order to obtain relief:

> We would also provide in a class action a limitation so that those who join in the class action or those who by timely motion intervene could be considered as the proper class, but not all who may be similarly situated, but who are not even aware of the fact that a case had been filed. 117 Cong. Rec. 31974 (1971).

This portion of the "Erlenborn substitute" was rejected by the Senate, did not survive the compromise negotiated in conference and was not enacted. See S. Conf. Rep. 92-681, 92d Cong., 2d Sess. 18-19 (1972), *reprinted* in [1972]

[32] The proposed 1972 amendments to Title VII, as approved by a sharply divided House Committee on Education and Labor, would have granted the EEOC broad cease and desist powers without restricting an individual's right to bring a class action. See H.R. Rep. 92-238, 92d Cong., 1st Sess. (1971), reprinted [1972] U.S. Code Cong. & Ad. News 2237. The "Erlenborn substitute" eliminated the cease and desist power, fashioned a two-year statute of limitations on back pay and would have restricted class actions. See the remarks of Rep. Erlenborn, 117 Cong. Rec. 31973-74 (1971).

U.S. Cong. Code & Ad. News 2179, 2183; *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 414 n.8 (1975).

Congress was plainly aware of the need to protect employers from the assertion of stale claims[33] but simply did not consider the time when suit was filed after EEOC exhaustion as a barrier needed to prevent their assertion.[34] As reflected in the refusal of Congress in 1972 to limit class actions and in its 1972 enactment of section 706(b), 42 U.S.C. §2000e-5(b), which required notice of the filing of an EEOC charge to be promptly served upon the employer, Congress determined that there was sufficient protection against stale claims in a two-year limit on back pay coupled with the requirement of the filing of an EEOC charge by a single employee on behalf of an aggrieved class "within 180 days after the alleged unlawful employment practice," section 706(e), 42 U.S.C. §2000e-5(e). There is no dispute in this case that such a charge was timely filed and that there was compliance with the

[33] See H.R.Rep. 92-238, 92d Cong., 2d Sess. 66 (1972), reprinted in [1972] U.S. Code Cong. & Ad. News 2237, 2275:

> To avoid the litigation of stale charges and to preclude respondents from being subject to indefinite liabilities, it is clear that a precise statute of limitations is needed. In view of the tremendous backlog currently existing at the EEOC, and the failure to require a prompt serving of the charges on named respondents as discussed hereafter, equitable principles require a limitation on liability.

[34] Congress plainly rejected the date of the commencement of suit as controlling a limitations period. In the 1972 amendments to Title VII, the House had enacted a provision limiting back pay awards to two years prior to the filing of a lawsuit; the Senate rejected this limitation in favor of a two year period to be computed from the filing of an EEOC charge, and the Senate version was enacted. See S.Conf.Rep. 92-681, 92nd Cong., 2d Sess. at 18-19 (1972), reprinted at [1972] U.S. Code Cong. & Ad. News 2183.

30-day prerequisite for suit of section 706(e)(1), 42 U.S.C. §2000e-5(e)(1) (amended 1972). United's tolling principle simply has no place within the statutory framework of Title VII and must be rejected. See *Electrical Workers* v. *Robbins & Myers, Inc.*, 45 U.S.L.W. 4068, 4070 (Dec. 20, 1976).[35]

C. The Type Of Settlements Encouraged By United's Rule Would Frustrate The Policies Of Title VII.

United contends that its construction of Title VII and Rule 23 is required to foster settlements. (Pet. Br. 16.) Apparently United believes that the possibility of reversal on appeal of a refusal to certify a class inhibits a defendant

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[35] We note the similarity between United's policy arguments (Pet. Br. 16-17) and the arguments advanced by Gerald Smetana at the hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, on S. 2515, in October, 1971:

> Since the range of such a respondent's liability can extend to unnamed and unknown persons, respondent cannot enter into a voluntary settlement agreement without risking a potential liability far greater than that which he hopes to settle through voluntary compliance. It seems perfectly reasonable to assume that the inhibition to voluntary settlement created by the lack of any limitation to the class for whom recovery can be obtained has caused the enormous backlog of cases presently pending before the Commission. Since voluntary adherence to the provisions of the Civil Rights Act is the only truly effective way in which total compliance with the law can be obtained, every effort should be made to remove those impediments which stifle voluntary compliance. Failure to limit the class for whom recovery can be obtained to those persons specifically named in the charge has such an inhibiting effect upon voluntary compliance. See Hearings at 261-62.

These arguments, of course, were rejected when Congress refused to limit class actions in the 1972 amendments to Title VII. See above at 31.

from settling and that the Court should fashion a rule time-barring the erroneously excluded class members. But where a class suit is brought and class status is denied in the trial court, both parties are on notice—especially here, where the error in denying the class was so obvious—that an excluded class member might appeal the decertification order. If defendant is willing to compromise his defenses to the individual plaintiffs only if they are barred from seeking review of the adverse class determination, it is a simple matter to negotiate for a term making the payment of settlement funds conditional, effective thirty-one days after the final decision when appeal rights will have lapsed. Failing this, a defendant can still buy its peace with the individual plaintiffs.

The type of settlement which United wants to encourage, while not presented by the facts of this case, would strike at the core of Title VII. United seeks a rule which would encourage settlements if, and only if, a district court has erroneously refused to allow a Title VII case to proceed as a class action. Under United's rule, the defendant could then wait 90 to 180 days, convince the named plaintiffs to agree not to appeal from the final decision to obtain relief for the excluded class members in exchange for a generous settlement of their individual claims. In United's view, the consequence of such a settlement would be to bar by a statute of limitations any subsequent recovery for the excluded class members.

Any settlement where the putative class representative "sells out" the rights of the class in exchange for personal profit would be contrary to the clear Congressional

policies underlying Title VII. If such a case were presented, we are confident that the settlement would be declared void as against public policy. See Developments in the Law—Class Actions, 89 *Harv. L. Rev.* 1318, 1459-50 (1976). *Cf. EEOC* v. *North Hills Passavant Hospital,* 544 F.2d 664 (3d Cir. 1976). The validity of such a settlement, however, is not presented in this case because the named plaintiffs at no time bargained away their rights to appeal.

United's own actions in this case demonstrate that its rule is not needed to advance settlements. There is nothing in the final judgment order surrendering the right of appeal (A. 90-92), and in fact the decision not to appeal was not made until two weeks after entry of the final order. (A. 105). If United had believed here that it was buying more than a release from the claims of the individual plaintiffs, it would have obtained a term withholding payment of the money awards until after the time for appeal had passed. This at least would have protected such a bargain against an appeal by plaintiffs. To the contrary, United paid over all the moneys before the appealable order of October 3, 1975 was entered, and its willingness to accept this final order with no such assurances belies its agreement.

The novel tolling principle urged by the petitioner in this case strikes at the core of the broad class relief required by Title VII, first by seeking to resuscitate the limitations on class actions rejected by Congress in the 1972 amendments to Title VII, and second by encouraging unwholesome settlements. As we have demonstrated above, this emasculation of Title VII is contrary to familiar principles which have been applied to statutes of limitations, and must be rejected.

CONCLUSION

For the reasons here stated it is respectfully submitted that the judgment of the United States Court of Appeals for the Seventh Circuit now before this Court be affirmed.

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